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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-191

JOHN JOSEPH CLUTTERBUCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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Los Angeles, California 90069
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Attorney for Petitioner

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JOHN JOSEPH CLUTTERBUCK,

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner John Joseph Clutterbuck respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 7, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 7, 1971, and this petition was filed within 30 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where a judgment imposing concurrent maximum sentences for four thefts of scrap metal over a five-day period is set aside on appeal, may the district court upon resentencing impose consecutive maximum sentences on the same four counts without explanation of reasons or reference to factual data to justify the action.

2. Where a judgment imposing a fine on one of four counts is set aside on appeal, may the district court upon resentencing impose fines on all four counts without stating any reason or factual data to justify the action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

The Fifth Amendment provides, in pertinent part:

[1] Appended to this petition is the full text of the pertinent provisions.

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

Title 18, United States Code, Section 641 provides, in pertinent part:

"Whoever . . . steals . . . any . . . thing of value of the United States . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

An indictment filed on April 4, 1968, in the Eastern District of California alleged that petitioner violated 18 U.S.C. §641 by stealing government property from an air force base in Sacramento [R. 2-3]. Count I alleged a theft on Thursday, February 28, 1968; counts II and III charged thefts on Friday, March 1; count IV specified a theft the following Tuesday, March 5, 1968.[2]

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[2] The indictment further recited 18 U.S.C. §641 violations in counts 5 and 6, and an 18 U.S.C.

Adjudging petitioner guilty as charged, the district court on August 30, 1968, imposed on each count a sentence of imprisonment "for a term of ten years, those sentences to be served concurrently" [R. T. 2545]. A fine in the amount of $10,000 was imposed "[o]n Count IV only" [R. T. 2547].[3]

---

2 (Continued)

§371 conspiracy in count 7. Although petitioner was convicted on these counts and sentenced to concurrent terms of 10 years, 10 years and 5 years, respectively, his trial counsel pursued appeal only on the first four counts. On the latter three counts, execution of sentence was suspended and petitioner was placed on probation for five years to commence upon completion of sentence on the first four counts. A $5,000 fine was imposed as a condition of probation [R. 70].

3 In setting the $10,000 fine the district court said it had no idea what the government's total cost was for the four-week trial, but that "the jury fees alone, were $3,268.50." [R. T. 2545.] Assessing an additional $5,000 fine, see note 2, supra, the court hoped partially to "compensate the Government for the burden that Mr. Clutterbuck has cast upon it." [R. T. 2546.] At the time of the 1968 sentencing, petitioner was a 54-year-old grandfather who had no prior felony convictions, had lived in Sacramento since his 1942 arrival to work for the government, and had been a proprietor in the salvage business since 1945 [R. T. 1763-68]. While not mentioning these factors, the district court took note that petitioner owned "a great deal more furniture

On petitioner's appeal pursuant to 28 U.S.C. §1291, the court observed that the stolen government property was "steel scrap" which was worth "six cents to ten cents a pound." United States v. Clutterbuck, 421 F.2d 485, 486 (9th Cir. 1970). Since the four counts charged theft of a total of only 170 pounds (worth a total of $10 - $17), there was no basis under 18 U.S.C. §641 for imposing a felony penalty. The value of the scrap was not more than $100 and thus the misdemeanor sanction of not more than one year imprisonment and/or a $1,000 fine would be applicable. The court concluded: "The sentence imposed is set aside and the matter is remanded for resentencing." Id.

On remand, the resentencing matter came before the court which had imposed the erroneous sentence. The August 30, 1968 sentence of 10 years imprisonment on each of the four counts was the maximum provided for an 18 U.S.C. §641 felony. Upon resentencing on July 13, 1970, the district court inflicted the maximum misdemeanor penalty of one year imprisonment on each count [C.T. 8, 14;

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3 (Continued)

than I got in my home." [R.T. 2536.] The court saw the case as "a pretty serious matter" not because of "the gravity of the crime" but because of the "long period of time that we spent" and the high "Government cost." [R.T. 2545.]

2 R.T. 17]. Whereas the imprisonment terms under the previous sentence were to run concurrently on the four counts, the district court now specified that the four terms would be consecutive. The former sentence had assessed a fine on count IV only; the post-appeal sentence levied the maximum fine not only on count IV but also on counts I, II and III, the fines to be cumulative.[4]

Petitioner again sought relief on appeal (28 U.S.C. §1291), challenging the district court action on Fifth Amendment double jeopardy and due process grounds. Although petitioner had pointed, inter alia, to the absence of any intimation of misconduct subsequent to the original sentencing and to the district court's confessed "unhappiness" with the appellate reversal which required the resentencing [2 R.T. 2-3, 8, 13-14], the court of appeals rejected reliance on North Carolina v. Pearce, 395 U.S. 711 (1969), because it viewed the sentence on remand was less severe than the sentence originally imposed. United States v. Clutterbuck, ___ F.2d ___, ___ (9th Cir. 1971) (No. 26,518; July 7, 1971; slip sheet at page 2). Finding that in following the mandate to resentence the district court could appropriately proceed afresh, the court affirmed the imposition of four consecutive sentences and four separate fines. Id. at 3.

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[4] The district court provided that petitioner would receive credit for time served under the August 30, 1968 sentence [2 R.T. 9].

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS SANCTIONS A FEDERAL DISTRICT COURT SENTENCING PROCEDURE PATENTLY OFFENSIVE TO MINIMAL DUE PROCESS STANDARDS.

Unbridled discretion and unprincipled review form an unparalleled pollutant of the atmosphere of due process of law guaranteed by the Fifth Amendment to saturate the administration of justice in federal courts. Were it not for the presence of this petition it would be galaxies past the pale of imagination to assert circumstances today where a theft of $17 worth of scrap metal could deprive a man of four years of liberty and four thousand dollars of property. And the surface injustice of a result so befitting a Hugo novel is merely a manifestation of the pervasive disregard of fundamental principles which has brought petitioner's case before this Court.

During the course of five days early in 1968 petitioner took four loads of scrap steel

from an air force base in California.[5] Whatever salvage value petitioner might have realized from the scrap, the 170 pounds were worth not more than $17 to the government. Under 18 U.S.C. §641, a statute aimed primarily at protection of public records but extending to other valuable government property, petitioner was charged with and convicted of four felonious crimes for his unauthorized scrap hauling. When petitioner was sentenced by the district court, his outstanding reputation built over 25 years in the community was ignored because of the court's preoccupation with the costs sustained by the government in according petitioner his right to a jury trial which lasted four weeks [R.T. 2545-46]. Due to the time and expense of trial the court found the case was more serious than any in 14 years [R.T. 2545] and accordingly sentenced petitioner to 10 years imprisonment and a $10,000 fine, the maximum for an 18 U.S.C. §641 violation. When the court later learned from the court of appeals that petitioner was subject only to misdemeanor punishment, it was unhappy with the ruling [2 R.T. 2-3, 8, 13-14] and proceeded to impose the maximum punishment for four violations instead of one. The procedures won the approval of a court of appeals assertedly resting its reasoning on reality but indeed invoking

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5 The 1970 opinion of the court of appeals erroneously set forth the four occasions as extending over a five-week period, United States v. Clutterbuck, 421 F.2d 485 (9th Cir. 1970), instead of the five-day period reflected by the record.

a pretty rhetoric to set a perilous precedent.

Encountering threshhold questions, if it may be assumed the court of appeals did not err in concluding Congress intended the scope of 18 U.S.C. §641 to include the taking of discarded property with scrap value only, it is difficult to credit the further proposition that the statute allows the offense of stealing scrap to be multiplied by the number of loads taken in a five-day episode. Cf. Milanovich v. United States, 365 U.S. 551, 554 (1961); Heflin v. United States, 358 U.S. 415, 419-20 (1959). Moreover, if such a legislative lapse could be imputed, there would still loom the impact of the developing Double Jeopardy Clause that multiple statutory violations in one transaction constitute the "same offence." See Ashe v. Swenson, 397 U.S. 436, 448, 453-54 (1970) (Brennan, J., concurring). Thus petitioner's four loads of scrap from the same location over a short period of time may properly be held a single violation punishable no more times than it could be prosecuted. See Ex parte Lange, 85 U.S. (18 Wall.) 163, 169 (1873).[6]

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6 Under the 98-year establishment of Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), it should be remembered that the district court imposed the original sentence upon petitioner on August 30, 1968 and then committed him to the custody of the attorney general. Execution of the sentence having commenced, petitioner was released on bond pending appeal. The judgment of concurrent sentences on the four counts and fine on one count only thus may not have been

Approaching the pivotal inquiry, it appears with unmistakeable clarity that the district court's 1968 sentencing of petitioner to ten years imprisonment coupled with a $10,000 fine was based upon wholly irrelevant factors, including the objective of recouping the costs of trial by jury. Since penalizing petitioner for exercise of his Sixth Amendment right to a jury's determination of guilt necessarily impeded the court's capacity to sentence "with insight and understanding," Harris v. United States, 382 U.S. 162, 166 (1965), the court-imposed barter of rights was wholly inconsistent with fundamental due process principles. See, e.g., North Carolina v. Pearce, supra, 395 U.S. at 724; Simmons v. United States, 390 U.S. 377, 393-94 (1968).

Most critical perhaps is the question of the effect of the 1968 sentencing proceedings upon the 1970 resentencing. It would appear from an analytical lattice that in imposing the original concurrent sentences on the four counts, the court presumably determined that the four thefts over the five-day period were not offenses of the separate character which might warrant consecutive punishments; thus amply supported is the implied determination that the interests of justice could be furthered by only one

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6 (Continued)

alterable by the district court. See, e.g., Borum v. United States, 409 F.2d 433, 439-41 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969); but see Kitt v. United States, 138 F.2d 842 (4th Cir. 1943).

maximum term of imprisonment. Similarly, the court's levying the maximum fine on only one of one of the four counts inescapably implies its determination that no fine should be assessed on the other three counts. See, e.g., Patton v. North Carolina, 381 F.2d 636, 645 (4th Cir. 1967). It follows of course that having determined that the four counts should be punishable by one maximum sentence, the court was estopped from imposing four maximum punishments at the 1970 resentencing, see Pollard v. United States, 352 U.S. 354, 359 (1957), absent identification of some conduct of petitioner to justify the increase. See North Carolina v. Pearce, supra, 395 U.S. at 726; United States v. Barash, 428 F.2d 328, 332 (2d Cir. 1970).

Petitioner's only relevant conduct after the 1968 sentencing was his successful attack on the court's imposition of felony punishment. United States v. Clutterbuck, supra, 421 F.2d at 486. It was manifest that petitioner had committed only misdemeanor theft under 18 U.S.C. §641, see, e.g., United States v. Horning, 409 F.2d 424, 426-27 (4th Cir. 1969), and that the district court erred by exceeding the maximum misdemeanor sentence of one year imprisonment and a $1,000 fine. Upon remand for resentencing as misdemeanor theft, the district court ignored its previous determination that one-fourth of the possible punishment was proper and instead exacted a sentence of the mathematical maximum.

Such a flagrant abuse of the sentencing power is constitutionally unjustifiable. The

court of appeals sanctioned the excursion on the theory that the 1970 sentence was less severe than the 1968 sentence, without acknowledging that the district court in fact increased the sentence to the fullest extent of its power.[7]

2. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER COURTS, INCLUDING THE SECOND CIRCUIT COURT OF APPEALS.

By sanctioning the extravagant district court sentencing approach in the present case, the court of appeals has drawn itself into sharp conflict with courts which accord North Carolina v. Pearce, supra, a less niggardly reading. See, e.g., Wood v. Ross, 434 F.2d 297, 299-300

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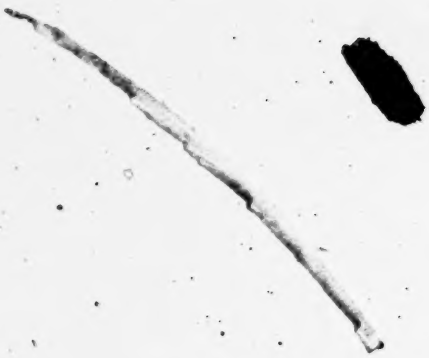
[7] In refusing to apply Pearce, the court of appeals cited its earlier decision in Thurman v. United States, 423 F.2d 988 (9th Cir.), cert. denied, 400 U.S. 911 (1970). The court was oblivious to the distinctions that Thurman involved resentencing on the original felony charges and not resentencing on misdemeanor counts instead of invalid felony charges, and that Thurman resentencing was in the interests of leniency, agreeable to all parties, whereas petitioner's sentence was the product of the court's unilateral attempt to mete out the most severe sentence possible under the circumstances.



(4th Cir. 1970); United States v. Lopez, 428 F. 2d 1135, 1139 (2d Cir. 1970); United States v. Barash, 428 F. 2d 328, 332 (2d Cir. 1970).

In Lopez, supra, the Second Circuit court of appeals held that the district court was not justified in assessing fines on all four counts where the original sentence had imposed fines on only two of the four counts. In the case at bar, the Ninth Circuit has held that a district court upon resentencing is justified in levying fines on all four counts where the former sentence had set a fine on only one count, and that no explanation need appear on the record.

The Supreme Court of California has squarely held that where a judgment imposing concurrent sentences for separate offenses is vacated on appeal, the trial court upon a retrial may not impose consecutive sentences. People v. Ali, 66 Cal. 2d 277, 281 (1967); see People v. Thornton, 14 Cal. App. 3d 324, 326-27 (1971). Without mention of Ali or its reasoning that indirect means of increasing sentence may not be tolerated, the Ninth Circuit court has reached the opposite conclusion in approving the instant action of the district court for California's eastern district. [8]

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8 In a well-reasoned opinion relying in part on Ninth Circuit precedent, the Missouri Supreme Court has reached a holding which conflicts with the views expressed at bar by the court of appeals. Wright v. State (June 14, 1971), in 9 Crim. L. Rptr. 2273 (July 7, 1971).

There is no rational basis for sustaining the judgment of the court of appeals in this case. To allow the decision to develop any precedential viability would portend a fresh harvest of the sort of shocking vindictiveness condemned by this Court in North Carolina v. Pearce, supra, 395 U.S. at 725-26, and by courts other than the Ninth Circuit. The holding on the present facts that petitioner was accorded due process of law denies the very essence of the concept.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit court of appeals.

Respectfully submitted,

BARRY TARLOW

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. JOHN JOSEPH CLUTTERBUCK, *Appellant.*	No. 26,518

[July 7, 1971]

On Appeal from the United States District Court for the Eastern District of California

Before: MERRILL, BROWNING and HUFSTEDLER, Circuit Judges

MERRILL, Circuit Judge:

Appellant was convicted of theft of Government property in excess of $100, in violation of 18 U.S.C. §641.[1] He was given concurrent sentences of ten years on each of four counts, and on one count he was fined $10,000.

On appeal we found that the Government had "failed to prove the value of the articles stolen under any count exceeded $100." *United States v. Clutterbuck*, 421 F.2d 485, 486 (9th Cir. 1970). We noted that the statute under which appellant had been convicted and sentenced provides that, where the value of the property stolen is not shown to be in excess of $100, the maximum sanction is a fine of $1,000 or imprisonment for one year or both.

[1] "Whoever • • • steals • • • any • • • thing of value of the United States • • •

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Therefore, we held: "The sentence imposed is set aside and t matter is remanded for resentencing." *Id.*

On resentencing pursuant to our remand, appellant was giv four consecutive sentences of one year each and a $1,000 fine each count—a total of four years' imprisonment and $4,000 fi substantially less than the penalties originally imposed.

On this appeal appellant contends that, since the original se tences on the several counts were concurrent and a fine was i posed on but one count, the resentencing on a consecutive ba and with fines imposed on all counts was improper. All the jud properly could do on remand, appellant contends, was to redu the prison sentence to four concurrent terms of one year each a the fine to $1,000.

North Carolina v. Pearce, 395 U.S. 711 (1969), on which a pellant relies, does not compel this result. There the Court w concerned that the possibility of increased punishment on rema would deter the exercise of appeal rights. Any sentence on mand less severe than the sentence originally imposed wou avoid conflict with the *Pearce* rule. *See Thurman v. Unit States*, 423 F.2d 988 (9th Cir. 1970).

Nor does *Kennedy v. United States*, 330 F.2d 26 (9th C 1964), support appellant's position. That case concerned t power of a district court, acting on its own authority, to corre sentence under Rule 35, Federal Rules of Criminal Procedu It held that where the original sentence was unlawful on accou of its being in excess of the statutory limit for the crime f which it was imposed the District Court could not impose who new sentences pursuant to a Rule 35 motion. Rather, the co was limited to correcting the original sentence by eliminating t excess that rendered it illegal.

However, this court in *Kennedy* expressly distinguished *K v. United States*, 138 F.2d 842 (4th Cir. 1943), where resente ing had been directed by a reviewing court. It was stated, 3 F.2d at page 29:

> "On the first appeal, in Kitt, instead of revising the se tence by reducing the term of imprisonment to one with the statutory limits, as the Appellate Court might have do and affirming that part of the judgment, it remanded t

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case for an enirely new sentence. As stated in United Stat v. Chiarella, supra, 214 F.2d at page 842:

> 'That did away with the original sentences and so it w held on the second appeal that the district court migl resentence by imposing any sentence which could lawfull have been imposed originally.'
>
> In the instant case the original sentences were impose by the District Court and the same court did the resenten ing without any mandate from an Appellate Court."

Here, in contrast, the district judge did no more than follo our mandate.

With reference to the terms of our earlier remand, it may b noted that the error which we corrected was not one in determin ing the proper extent of punishment for a crime the defendan was lawfully found to have committed; rather the error was i determining the dimensions of the crime for which the defend ant was punishable. Proceeding afresh is entirely appropriate i such a case, since never had an exercise of the judicial sentencin power and discretion been directed to offenses of the dimensio we found to exist.

Affirmed.

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APPENDIX B

TEXT OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 18, section 641 (West 1966):

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-191

JOHN JOSEPH CLUTTERBUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Eastern District of California, petitioner was convicted on four counts charging the theft from an air force base of United States property worth more than $100 in violation of 18 U.S.C. 641. He was sentenced to concurrent prison terms of ten years and fined $10,000 on one count. On appeal, the court of appeals held that there was insufficient evidence to show that the value of the property on any one

count exceeded $100; hence it remanded to the district court for resentencing under the misdemeanor provisions of Section 641. On remand, the district court sentenced petitioner to four consecutive one-year prison terms and fines of $1,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioner's claim that his resentence violated the principles of *North Carolina* v. *Pearce*, 395 U.S. 711, is answered in the opinion below (Pet. App. A, 1-3), on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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OCTOBER TERM 1971

No. 70-191

THOMAS RAY SANDELL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1971

No. 70-191

THOMAS RAY SANDELL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

Petitioner, pursuant to Rule 24(4) of the rules of this court, files this Reply Brief addressed to arguments raised in the brief of the government.

CLARIFICATION OF STATEMENT

The statement contained in the government's brief is in some respects argumentative rather than factual. It is true, as stated by the government, that the record may support a conviction for receiving stolen property (see government's brief, page 3); however, petitioner was not charged with such a crime. In the record there is nothing to show that petitioner was told why the false

identification papers were wanted, but merely that he sold the false identification for a money order machine. While it is true that Mr. Donald Hill did identify petitioner, a very material fact is that he first identified one of the others indicted by the same indictment, Count Five, which was dismissed after Mr. Hill's in-court identification of petitioner on the second day of trial.

ARGUMENT

The government attempts in its brief to show that the in-court identification of petitioner by Miss Chesser, a teller in a savings and loan association, was either proper or, if improper, was harmless since he was convicted on another count anyway. This is a fallacious argument. This identification was crucial to the government's case against petitioner. The government further states that the detective who first interviewed the witness showed her a photograph of Gregory (the man who was probably the one who actually cashed the money order petitioner is accused of cashing) but the exhibit (government's 9) shows that he did not show her a picture of that Joseph Gregory. Government's exhibit 8-A shows what Gregory looked like at the time in question (R469-471). This was not the same Joseph Gregory depicted in Government Exhibit 9 (Ex. 9-A). The argument is therefore a misleading argument.

The fact remains that the witness had the impression obtained from the first photographic identification so

fixed in her mind--even though she denied making such an identification--that she identified (mistakenly) petitioner at trial. See Simmons V. United States, 390 U.S. 337, 19 L. Ed. 2d 1247, 88 S. Ct. 967(1968).

The government also argues that Gregory denied cashing the money order in question. This is only a half truth. He did at first, on direct examination, say he did not cash a money order at First Federal in West Palm Beach, but later, on cross examination, he testified that: he was under the influence of narcotics (R 486); his false identification was in the name of Clifton J. Carlin (R 494); the signature endorsement (Clifton J. Carlin) on the money order in question is his (R 500, 530); he does not know how many money orders he cashed (R 504); he does not know where he cashed all of the money orders (R 504, 530-531); he was alone when he cashed one at a bank he just happened to be passing by (R 445); and he was with the defendant Seader when he cashed another (R 531). It is petitioner's belief that the one Gregory cashed at a bank he "happened to be going by" was cashed at First Federal and is the one he (Gregory) said he endorsed. This seems to be a classic case of mistaken eye-witness identification. No authority need be cited that this is very often unreliable.

The government also belittles petitioner's contention that Mr. Hill's identification was in error, by indicating that since petitioner was living with Miss Neal it makes no difference that

petitioner was not charged as being the person involved in cashing the money order at Mr. Hill's place of business. This would appear to be an argument to the effect that since he was living with a woman other than his wife he must be guilty of something. The money order involved with Mr. Hill was No. AT 737-052-618. This was the money order involved in Count V of the indictment. Petitioner was not charged in this Count, therefore he had no reason to even attempt to prepare a defense to a charge of having anything to do with cashing this particular money order. He was, in effect, tried for something he was not charged with and as a matter of fact another person stood accused of this until after petitioner had been improperly identified (R 412). This was like leading petitioner into a trap unaware that Count V really was intended to apply to him. If petitioner was to be tried for the act described in Count V, he should have been indicted for it. This provision of the Fifth Amendment is absolute--it says that no person shall be held to answer for an infamous crime unless indicted. There is no qualification, just a flat prohibition. Our system of justice is basicly fair and this is one of the constitutional provisions that helps to assure that it will always remain fair. The Sixth Amendment also provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature of the accusation. For some reason, which appears only inferentially in the record, the government used as a witness against petitioner a man who had previously identified a co-defendant as the person who

who drove a young lady to the witness's business establishment where the young lady gave the witness a money order as a deposit on a rental car. The co-defendant was indicted, together with the young lady for transporting the money order (a forged security) in interstate commerce (Indictment, Count Five). It seems clear that the government itself considered Mr. Hill as an unreliable witness. The improper lineup took place in October or November of 1968 (Tr. 419), the indictment was filed in 1969, but petitioner was not charged in the indictment.

The government also argues that Miss Neal admitted passing the fraudulent money order (government's brief, 7). She also told the court and jury who it was that drove her to Mr. Hill's place of business, and it was not petitioner (Tr. 727-728). It is asserted by the government that the identification at the jail by Mr. Hill was not a lineup identification, but the physical description of the events surrounding this identification fit a lineup even if the word is not used (Tr. 418; 419; 426; 428-430), and it took him forty-five minutes to an hour to make any identification (Tr. 428).

CONCLUSION

The fundamental nature of the guarantee of the Fifth Amendment that no person shall be held to answer for an infamous crime unless on a presentment or indictment by a grand jury, and of the guarantee of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy

the right to be informed of the nature and cause of the accusation were violated by the trial of petitioner on the charge of Count Five of the indictment. He was not charged in this Count, yet the government as a matter of actual fact tried him for it by having the witness Hill identify him before the jury as the person involved, and then dismissing this Count as it applied to the other defendant charged thereby. The facts surrounding the improper lineup identification and the apparent confusion of the witness all point up the necessity of safeguards as pronounced by United States V. Wade (1967) 388 U.S. 218; 18 L. Ed. 2d 1149; 87 S. Ct. 1926.

To compound this error the witness against petitioner regarding Count One (d) and Count Two was a witness with an obviously faulty memory who had viewed a recent mug shot of petitioner from a set of photographs containing two photographs of petitioner. She chose this emphasized person who was obviously in custody as the person who cashed a forged money order. She forgot about making this photographic identification, but about a week before the trial she was shown the same photographs and picked out the same one. She observed petitioner in the courtroom (but from the back). She then made an in-court identification. It is petitioner's belief that her memory of him was a memory gained from the impression or image of the first, and forgotten, photographic identification. Except for this mistaken in-court identification, all of the evidence at the trial indicated that another person who had been named in the same indictment

(Counts One and Four) had cashed the particular money order. Petitioner submits that the identification of him by this witness, tainted by impermissibly suggestive pretrial procedures, was error.

Petitioner submits that his conviction should be reversed and upon retrial the identification by Chesser and Hill should be excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Petitioner have been served upon: Solicitor General, Department of Justice, Washington, D.C. 20530 by Air Mail, postage prepaid, and one copy on United States Attorney, P. O. Box 1070, Miami, Florida, by first-class mail, postage prepaid, this 3rd day of September, 1971.

JOHN S. CALL, JR.

JOHN S. CALL, JR., Atty.